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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 300

STATE OF MARYLAND,

Petitioner,

vs.

THE BALTIMORE BROADCASTING CORPORATION,
a body corporate,
WCBM,

Respondent.

(Case No. 171, Court of Appeals of Maryland)

BRIEF IN OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI

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CONTENTIONS OF RESPONDENT

I.

The Petition for Writ of Certiorari in the instant case must stand or fall under Section 1257(3) of Title 28, United States Code Annotated. To justify the granting of the writ, it must clearly appear that the case complies strictly with the terms of said section. This, it fails to do.

II.

The Petitioner has no interest, except possibly of an official nature, in the outcome of this case and, therefore, has no standing in this Court to attack the decision of its own Court of Appeals of Maryland.

III.

Under Maryland Code Annotated, Article 5, Section 107, the State of Maryland lacks a right to request certiorari or to appeal from an acquittal in a contempt of court proceeding.

IV.

The "Federal Question" attempted to be raised by The State of Maryland in the Petition for Writ of Certiorari is frivolous in that the point has repeatedly been decided by decisions of this Court in the "clear and present danger" cases, there obviously being no merit in the contention that a different rule is necessary in contempt by publication cases where prospective Jurors are involved as distinguished from Judges.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI IN THE INSTANT CASE MUST STAND OR FALL UNDER SECTION 1257(3) OF TITLE 28, UNITED STATES CODE ANNOTATED. TO JUSTIFY THE GRANTING OF THE WRIT, IT MUST CLEARLY APPEAR THAT THE CASE COMPLIES STRICTLY WITH THE TERMS OF SAID SECTION. THIS IT FAILS TO DO.

Section 1257(3) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State *Statute* is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, *right*, privilege or immunity is specially set up or claimed under the *constitution*, treaties or statutes of, or commission held or authority expressed under, *the United States*." (Italics added.)

This case was originally instituted by the Criminal Court of Baltimore City, which passed an order on July 20, 1948, requiring the Respondent herein to show cause why it should not be adjudged in contempt of that Court for making and publishing by radio broadcasts, reports concerning the alleged conduct and actions of one Eugene James, then in the custody of the Baltimore Police Department accused of murder, and for thus allegedly embarassing and obstructing the administration of justice (R. 76).

Pursuant to a demand for particulars by this Respondent (R. 77), the States Attorney for Baltimore City filed an answer to said demand setting forth the specific reports or broadcasts made by this Respondent and claimed to constitute the constructive contempt charged. The Bill of Particulars further stated that the contempt proceedings were based upon Rule 904 of the Rules of the Supreme Bench of Baltimore City and also "upon the general power and authority of the Court to issue citations for contempt for the protection of a prisoner's right to a fair trial" (R. 77-81).

This Respondent filed an answer denying that the publication so particularized constituted the contempt charged and, further, by its answer, attacked the validity of Rule

904 of The Supreme Bench of Baltimore City under the Constitution of The United States as a violation of the freedom of speech and of the press guaranteed thereunder (R. 82-86).

The trial Court held Rule 904 valid with the exception of Section E thereof, which was held invalid because based upon the discarded "reasonable tendency" rule of The United States Supreme Court, and the trial Court thereupon found this Respondent under the agreed statement of facts stipulated in the case (R. 86-105) and upon the testimony of the witness produced on behalf of the prosecution (R. 105-113), guilty of the Contempt as charged under Rule 904 of The Rules of The Supreme Bench of Baltimore City. (See Memorandum Opinion R. 119-143.)

Upon appeal to the Court of Appeals of Maryland, the Court reversed the lower Court and declared Rule 904 invalid in its entirety as a violation of the freedom of speech and of the press guaranteed by the First Amendment to the Constitution of The United States, as made applicable to the respective States by the Fourteenth Amendment, and, further held that the facts did not constitute a "clear and present danger" to an impartial jury trial guaranteed to James under the Maryland Constitution (R. 210-252).

The State of Maryland now seeks a review of the decision of its own Court of Appeals by petition for writ of certiorari to the United States Supreme Court. In order to obtain review by certiorari in this manner, the State must affirmatively show that this case comes strictly within the terms of Title 28, United States Code Annotated, Section 1257(3), which is the alleged basis of authority for taking this case before the United States Supreme Court upon Writ of Certiorari.

Gorman v. Washington University, 316 U.S. 98;
Memphis Natural Gas Co. v. Beeler, 315 U.S. 649.

Section 1257(3) of Title 28 sets up three classes of cases wherein review can be obtained by certiorari. The first class is where a treaty or statute of the United States is drawn in question. Obviously, no treaty or statute of the United States has been attacked in this case. The second class is where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. There is no statute of the State of Maryland, as such, involved in this case. Only a local rule of the Supreme Bench of Baltimore City has been attacked and found invalid by the Court of Appeals of Maryland as a violation of the freedom of speech and of the press as guaranteed by the Federal Constitution. The question of the validity of Rule 904 is not pressed by the Petitioner in its petition for writ of certiorari and thus the validity of the rule itself is no longer in issue. The Petitioner seeks a reversal of the decision of The Court of Appeals of Maryland on the ground that the publications by radio broadcast made by this Respondent did in fact constitute a "clear and present danger" to the administration of justice and that, consequently, the Criminal Court of Baltimore City, has the inherent power to punish as a contempt therefor.

This Court is not now asked to determine the validity of the local rule of Court under this petition for writ of certiorari, and is not now asked to determine the validity of any Statute of the State of Maryland as required under this portion of Title 28, Section 1257(3), as the basis for jurisdiction in granting the writ.

The third class under said Section 1257(3) is where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States. The Petitioner seeks to justify this petition for writ

of certiorari on the ground that the State of Maryland has a right and duty under the Constitution of the United States to guarantee and insure to an accused a trial by an impartial jury as a constituent part of due process of law in Maryland, and that this right of the Petitioner has been denied by the decision of the Court of Appeals of Maryland. This reasoning by the Petitioner is fallacious and frivolous and is an obvious attempt by the Petitioner to procure a decision of this Court in the nature of a Declaratory Judgment and thereby procure a reversal of the decision of the highest Court of the State of Maryland. No rights, privileges or immunities guaranteed under the Constitution of the United States to the State of Maryland are involved in this proceeding. The right to a fair and impartial jury trial which the Petitioner seeks to assert in this petition, is that which is claimed to be guaranteed to Eugene James as an accused individual on trial for his life, not a right guaranteed to the State of Maryland. The State of Maryland has no right as such under the Constitution of the United States and it cannot be allowed to collaterally attack a decision of its own Court of Appeals, by attempting to claim such a right indirectly on behalf of a third person, Eugene James, who in his own criminal trial in the lower Court, and in his appeal to the Court of Appeals, did not even claim that he had been prejudiced by the broadcasts made by this Respondent.

The Petitioner cites: Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1945); and Craig v. Harney, 331 U.S. 367 (1946), as authority for sustaining the jurisdiction of this Court in this case. An examination of these cases readily reveals that in each of these three cases it was the alleged contemnors who petitioned for writ of certiorari to protect their right to freedom

of speech and of the press guaranteed to them as individuals under the First and Fourteenth Amendments of the United States Constitution and not the State seeking to uphold its claimed right to punish for contempt. The former situation would prevail if the Respondent herein were seeking certiorari, the latter is the situation now presented by the Petitioner. This is an anomalous situation to say the least, and this Court should not grant a writ of certiorari under Title 28, United States Code Annotated, Section 1257(3) on the basis of such a fallacious and frivolous claim of right by the Petitioner, when in fact no such right of the Petitioner exists.

II.

THE PETITIONER HAS NO INTEREST, EXCEPT POSSIBLY OF AN OFFICIAL NATURE, IN THE OUTCOME OF THIS CASE AND, THEREFORE, HAS NO STANDING IN THIS COURT TO ATTACK THE DECISION OF ITS OWN COURT OF APPEALS OF MARYLAND.

It should be noted at the outset that this contempt of court proceeding was instituted by two judges of the Supreme Bench of Baltimore City who issued a citation charging the Respondent with contempt for having made the broadcasts in issue and for thus allegedly embarassing and obstructing the administration of justice (R. 76). The case was accordingly titled as follows (R. 76):

"In the Criminal Court of Baltimore City

In the Matter of Contempt Proceedings Against
The Baltimore Broadcasting Corporation
a body corporate, WCBM"

Consequently, the proceedings were prosecuted on behalf of the Criminal Court of Baltimore City by the State's Attorney for Baltimore City, and the State's Attorney accordingly entered into the stipulated statement of facts

on behalf of the "Criminal Court of Baltimore" as the prosecuting authority or party in interest (R. 86). After the decision of the lower Court, this Respondent entered its appeal under the same titling. The Clerk of the Criminal Court, however, in making up the record and transmitting the same to the Court of Appeals of Maryland changed the titling of the case on appeal to the following:

"The Baltimore Broadcasting Corporation,
a body corporate, W C B M,
Appellant,

vs.

State of Maryland,
Appellee,"

although in reality the Criminal Court of Baltimore City was and still is the only interested party to the prosecution. There has been no formal severance of the Criminal Court as a party nor has there been filed a petition on behalf of the State to intervene on behalf of the prosecution. This Respondent can find no authority in Maryland for such an exchange of prosecuting parties and asserts that the mere change of titling of the case by the Clerk of the Court cannot give the State of Maryland any interest in the case, although the Respondent is informed that the practice for many years in Maryland has been for the Attorney General of Maryland to represent the various State's Attorneys in criminal appeal cases. Such a practice, however well established, cannot be used as a basis of authority to substitute the State of Maryland in place of the Criminal Court of Baltimore City as the prosecuting authority in interest.

As pointed out in Proposition I, ante, the State of Maryland has no personal interest in the outcome of this case other than its frivolous claim to a right under the Four-

teenth Amendment to the Constitution of the United States to guarantee to an accused a fair and impartial jury trial. As has already been pointed out, this right to a jury trial belongs to the accused and not to the State of Maryland. The only person who can claim this right as a basis for the granting of a Writ of Certiorari in this Court is Eugene James, the accused, who did not even raise the point on his own behalf in his criminal trial nor on appeal and who has since been executed by the State.

There is ample authority under the decisions of this Court which hold that a petitioner seeking certiorari in this Court must have a personal not merely an official interest in the outcome of the case in which the writ is sought.

Columbus and Greenville Railway Co. v. Miller, State Tax Collector, 283 U. S. 96, 99;
Stewart, Treasurer, Wyandotte County, Kansas v. City of Kansas City, Kansas, 239 U. S. 14, 16;
Marshall v. Dye, 231 U. S. 250, 257-258;
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Braxton County Court v. West Virginia, 208 U. S. 192, 197-198;
Smith v. Indiana, 191 U. S. 138, 149;
Tyler v. Judge of Court of Registration, 179 U. S. 405.

In Coleman v. Miller, 307 U. S. 972, the facts of which are not in point with the instant case, the majority opinion of this court, speaking through Chief Justice Hughes, stated by way of dicta at pages 442-443:

> "The question of our authority to grant certiorari on the application of state officers, to review decisions of state courts, declaring state *statutes*, which these officers seek to enforce, to be repugnant to the Federal Constitution, has been carefully considered and our jurisdiction in that class of cases has been sustained." (Italics added.)

The following cases were cited in support of this statement.

Blodgett v. Silberman, 277 U. S. 1;
Boynton, Attorney General v. Hutchinson Gas Company, 291 U. S. 656;
Moorehead v. N. Y. ex rel Tipaldo, 298 U. S. 587.

An examination of the above cases so cited reveals that in each case a specific state statute had been attacked and held unconstitutional and the state official charged with enforcing the law applied for and was granted certiorari by this Court. In the case at bar, however, no state statute has been declared unconstitutional, but only a local rule of court has been held invalid as exceeding the authority of the Court under the ruling of the "clear and present danger" cases. This local rule of Court for Baltimore City is no longer even in issue according to the petition of the Petitioner. The State merely seeks to vindicate its right under its common law inherent power to punish this Respondent for contempt. Although the local court rule has been declared invalid, the courts of Baltimore City still retain, under the decision of the Maryland Court of Appeals, all the common law powers which they formerly had consistent with the clear and present danger rule of this court. There is no state statute which has been declared unconstitutional so as to give rise to any claim of jurisdiction in this Court upon writ of certiorari. The State, which the Respondent contends is not even a proper party in this case, is merely seeking a review of the facts under the "clear and present danger" rule. These facts have been thoroughly studied and weighed by the Court of Appeals of Maryland and found lacking under the "clear and present danger" rule, and this Court should not grant the writ of certiorari merely to review these facts at the request of the State which should be satisfied with a ruling thereon by its own Court of last resort.

III.

UNDER MARYLAND CODE ANNOTATED, ARTICLE 5, SECTION 107, THE STATE OF MARYLAND LACKS A RIGHT TO REQUEST CERTIORARI OR TO APPEAL FROM AN ACQUITTAL IN A CONTEMPT OF COURT PROCEEDING.

Under the law of the State of Maryland, prior to the enactment of Article 5, Section 107, Maryland Code Annotated, neither the prosecution nor the convicted contemnor had any right to appeal to the Court of Appeals of Maryland from the decision of the trial court.

> Ex Parte Sturm, 152 Md. 125, 136 A. 312;
> Kelly v. Montebello Park Co., 141 Md. 194, 118 A. 600.

In the latter case it was said at page 196:

> "* * * The common law rule was that a court of competent jurisdiction is the sole judge of contempt against its authority and dignity, and its judgment in such cases is final and conclusive, and not reviewable by any other tribunal, either on a writ of error or appeal, unless specifically authorized by statute."

After a discussion of the general subject of contempt, the court continued at page 204:

> "There is no statute in the State expressly providing for appeals in contempt cases, and under the common law rule, the decision of the general court in State v. Stone, supra (3 H. & McH. 115), and the decisions in a number of other states (People, ex rel, etc. v. Gilmore, 88 N. Y. 626; Hurley v. Commonwealth, 188 Mass. 443; Grand Lodge, K. P. of N. J. v. Jansen, et al., supra (62 N. J. Eq. 737); Staley v. South Jersey Realty Co., supra (83 N. J. Eq. 300), the order appealed from is not subject to review by this Court."

The above language of the Kelly case was subsequently cited with approval in Ex Parte Sturm, supra, at pages 124 and 125.

Thereafter, by the enactment of Ch. 357, Acts of 1927, now codified as Maryland Code Annotated, Article 5, Section 107, the Legislature provided for appeals in both constructive and direct contempt cases:

> "107: *Any person who has been adjudged in contempt of court* by any order or judgment passed to preserve the power or to vindicate the dignity of the Court, shall have the right to take an appeal from such order or judgment to the Court of Appeals. * * *" (Italics added.)

The same section further provides:

> "* * * In all such cases, it shall be the duty of the State's Attorney, either personally or by deputy or assistant, to prosecute such contempts as though the same were *criminal* cases." (Italics added.)

Obviously, only the convicted contemnor was given the right to appeal. Nowhere in the Maryland Code is the State given any right to appeal in contempt cases, and not having been given the right expressly by statute, the State had no right, in the event this Respondent had been acquitted in the lower court, to appeal to the Court of Appeals, and by this same reasoning, the State lacks the right to seek review of the decision of the Court of Appeals of Maryland via the petition for writ of certiorari addressed to this Court.

Appeals in criminal cases on the other hand are governed in Maryland by Maryland Code Annotated, Article 5, Section 86, and under that section of the code, it has been repeatedly decided by the Court of Appeals of Maryland that where an accused has been once tried and acquitted, the State has no right to appeal and thereby place the accused twice in jeopardy for the same offense.

> State v. Linger, 183 Md. 158, 165, 36 A. 2d 674;
> State v. Rosen, 181 Md. 167, 169, 28 A. 2d 829;
> State v. Shields, 49 Md. 301.

In State v. Rosen, supra, several persons were jointly indicted for selling bets on horse races and two others for conducting a lottery, and, upon being arraigned, the parties elected to be tried by the court without a jury. Thereafter, on motion of the defendants to quash a search and seizure warrant, a police officer was placed on the stand and examined by the State and the application for the warrant and the warrant were offered in evidence. The warrant was quashed and the defendants acquitted. The State attempted to appeal and the Court of Appeals of Maryland held that the defendants had been placed in jeopardy and the appeal by the State was dismissed. The Court in dismissing the appeal said at page 169:

> "Appellees have filed a motion to dismiss the appeal upon the well-known ground that they had once been acquitted and discharged upon a valid indictment; that the State has no right of appeal in such a case, unless such right is expressly conferred by statute, and cite: 2 Am. Jur.: Appeal and Error, 984, Sec. 227; 17 C. J. Criminal Law, Sec. 3310; 24 C. J. S., Criminal Law, Sec. 1659; State v. Shields, 49 Md. 301; Cochrane v. State, 119 Md. 539, 87 A. 400.
>
> "In Maryland there exists no such permissive statute, and the Court will not notice exceptions by the State except in cases where the parties accused have been convicted and have also taken exceptions and appeals. See also State v. King, 124 Md. 491, 496, 92 A. 1041, and Bishop on Criminal Law, 9th Ed., Vol. 1, Sec. 992."

Thus, even if this contempt proceeding be considered as an ordinary criminal case, this Respondent having been placed in jeopardy and evidence and testimony of witnesses having been introduced in evidence against it and having been acquitted by the decision of the Court of Appeals of Maryland, the State cannot now place this Respondent twice in jeopardy for the same alleged offense by petition

for writ of certiorari to this Court. Under the provisions of Maryland Code above cited, the State simply lacks the power or right to appeal or request certiorari in this case.

IV.

THE "FEDERAL QUESTION" ATTEMPTED TO BE RAISED BY THE STATE OF MARYLAND IN ITS PETITION FOR WRIT OF CERTIORARI IS FRIVOLOUS IN THAT THE POINT HAS REPEATEDLY BEEN DECIDED BY DECISIONS OF THIS COURT IN THE "CLEAR AND PRESENT DANGER" CASES, THERE OBVIOUSLY BEING NO MERIT IN THE CONTENTION THAT A DIFFERENT RULE IS NECESSARY IN CONTEMPT BY PUBLICATION CASES WHERE PROSPECTIVE JURORS ARE INVOLVED AS DISTINGUISHED FROM JUDGES.

From a reading of the brief of the Petitioner in this case, it is evident that the sole ground of the Petitioner's argument for a reversal of the decision of the Court of Appeals of Maryland, and to support its petition for writ of certiorari, is that this Court should set up a different rule to govern cases of this type where prospective jurors are involved as distinguished from judges.

This Court has repeatedly applied the "clear and present danger" rule to newspaper publications concerning matters then pending before the courts.

> Craig v. Harney, 331 U.S. 367,
> Pennekamp v. Florida, 328 U.S. 331;
> Bridges v. California, 314 U.S. 252;
> Nye v. U.S., 313 U.S. 33.

The Court of Appeals of Maryland considered this proposition now pressed by the Petitioner and dismissed the suggested distinction as untenable (R. 225-227).

> "It is suggested that the Supreme Court, which has not hesitated to extend the constitutional protection to procedural due process, might take a different view where juries or potential juries are concerned, rather than trial judges. This distinction is hardly tenable.

Judges are not so "angelic" as to render them immune to human influences calculated to affect the rest of mankind. Conversely, while juries represent a cross-section of the community, it cannot be denied that in every community there are citizens who by training and character are capable of the same firmness and impartiality as the judiciary. It is plainly a matter of degree. The dissenting opinions argue that neither judges nor juries can remain unaffected by comments and recriminations while a case is pending. This contention did not prevail, even in cases where the statements threatened the judges with retaliation, if they should reach a particular decision. Granted that the decisions are not directly in point, they seem to go further than we are required to do in the case at bar."

This Respondent likewise insists that a claim for such a distinction is untenable and raises a frivolous question, not worthy of serious consideration by this Court and not justifying the issuance of the writ of certiorari sought by the Petitioner.

CONCLUSION

It is respectfully prayed, therefore, that for the above reasons assigned by this Respondent that the Petition for Writ of Certiorari to the Court of Appeals of Maryland be dismissed and the writ denied.

Respectfully submitted,

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